

## TOPIC 2: US CONSTITUTION

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### Overview

The US Constitution is the supreme law of the United States. It provides the framework for our Federal Government and is the model for state governments. It establishes certain individual rights and provides protection against government interference with those rights. It also provides the authority for the federal and state governments to pass laws governing individuals and property. This chapter will review the major provisions (Articles) of the Constitution that establish the framework for the legal system. It will explore the dichotomy between federal and state governments and touch on the major constitutional protections of individual rights — primarily contained in the Bill of Rights and subsequent Amendments. Notably, it will explore the procedural protections for those made subject to the legal system. Lastly, it will explain the government's authority to pass laws and the standards that apply when determining the legality of the laws they pass.

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### VIDEO LESSON - INTRODUCTION



### VOCABULARY & CONCEPTS

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- [US Constitution](#)
  - [Separation of Powers](#)
  - [Checks and Balances](#)
  - [Legislative Branch](#)
  - [Executive Branch](#)
  - [Judicial Branch](#)
  - [Federalism](#)
  - [Supremacy Clause \(Preemption\)](#)
  - [Full Faith & Credit Clause](#)
  - [Privileges & Immunities Clause](#)
  - [Commerce Clause](#)
  - [Taxing and Spending Power](#)
  - [Contract Clause](#)
  - [1<sup>st</sup> Amendment](#)
  - [Establishment Clause](#)
  - [Free Exercise Clause](#)
  - [Business & Freedom of Religion](#)
  - [Freedom of Speech](#)
  - [Unprotected Speech](#)
  - [Obscene Speech](#)
  - [Fighting Words](#)
  - [Commercial Speech](#)
  - [Defamation and Speech](#)
  - [Political Speech](#)
  - [Overbroad Laws](#)
  - [Freedom of Press](#)
  - [Freedom of Assembly](#)
  - [5<sup>th</sup> Amendment](#)
  - [Due Process Clause](#)
  - [Incorporation Doctrine](#)
  - [Equal Protection Clause](#)
  - [Constitutional Standard of Review](#)
  - [Strict Scrutiny](#)
  - [Quasi-strict Scrutiny](#)
  - [Rational Basis Review](#)
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## TOPIC 2: US CONSTITUTION - QUESTIONS & ANSWERS

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### 1. What is included in the US Constitution?

The US Constitution is divided into seven articles. Article I, II, III establish the governance structure of United States. Article I establishes two legislative bodies, the House of Representatives and the Senate, to make the laws to govern the nation. Article II establishes the executive branch, which is led by the President, to enforce laws. Article III establishes the judicial branch of government to review the constitutionality of laws and their execution. Since its passage, the Constitution has been amended 27 times. Most of these amendments serve to protect individual rights, known as “fundamental rights”, against government infringement. Perhaps the best-known constitutional rights are stated in the first ten amendments to the US Constitution, which make up the Bill of Rights. The 14<sup>th</sup> Amendment, arguably the most important amendment, extended the protections afforded individuals under the Constitution by applying those provisions to state governments. Notably, the 14<sup>th</sup> Amendment introduced the Due Process and Equal Protection Clauses.

- *Note:* The Constitution protects against government infringement of individual rights. It does not protect against infringement by individuals.

- **Discussion:** Do you think that the brevity of the Constitution is positive or negative? Why do you think the document is concise? Do you believe that the Constitution should be subject to amendment? If so, under what conditions should the Constitution be amended?

- **Resource Video:** <http://thebusinessprofessor.com/what-is-included-in-the-us-constitution/>

### 2. What is the “Separation of Powers”?

The Constitution divides the US Government into the following three separate-but-equal branches.

- Legislative Branch (Article I) – House of Representatives and Senate (collectively, “Congress”)
- Executive Branch (Article II) – President
- Judicial Branch (Article III) – US Supreme Court

- **Resource Video:** <http://thebusinessprofessor.com/separation-of-powers/>

*Checks and Balances* - The government is structured as a checks-and-balance system whereby each branch independently checks the authority of the other branches. This system prevents any branch from becoming too powerful and eroding the rights of citizens. Below is brief description of how each branch checks the authority of the other branches.

- **Resource Video:** <http://thebusinessprofessor.com/checks-balances-us-system/>

- *Legislative Branch* - This branch of government passes laws that guide the executive branch in the execution of the law. Congress must approve the executive branch's budget and certain presidential appointments to high-level administrative positions. The US House of Representatives retains the authority to impeach (bring charges against) the President for misconduct committed while in office. Further, the US Senate has the authority to determine the merits of the impeachment and render judgment. Congress checks the power of the judiciary by passing laws that supersede or replace the existing common law developed by the judiciary. Lastly, Congress must approve the President's nomination of an individual for appointment to federal judicial positions, including the US Supreme Court.

- **Resource Video:** <http://thebusinessprofessor.com/legislative-branch-law/>

- *Executive Branch* - The executive branch is controlled by the President of the United States. This branch checks Congress's authority through the power to veto (strike down) legislation. When Congress presents the President with an approved bill to sign into law, the President can sign it, not sign it, or veto it. Signing it or failing to sign it will result in the bill becoming law. Vetoing the law strikes it down. Congress can only override a veto with a two-thirds (2/3) majority vote of both the House and Senate. The President, in turn, may selectively enforce laws that are within the executive branch's regulatory authority. Selective enforcement has the effect of reducing the impact of a law passed by the legislative branch. Lastly, the executive branch checks the judicial branch by nominating members to the federal judiciary and through the power to pardon those convicted under certain criminal statutes.

- **Resource Video:** <http://thebusinessprofessor.com/executive-branch-law/>

- *Judicial Branch* - The judicial branch checks the legislative branch by reviewing laws for constitutionality. Any law is subject to challenge on the grounds that it violates rights ensured under the US Constitution. The judicial branch also checks all executive orders or actions for constitutionality. In either case, it has the ability to overturn unconstitutional laws and executive orders or actions. Further, the court can limit the scope of a law by narrowly or broadly interpreting it in a manner that does not infringe upon constitutional rights.

- **Resource Video:** <http://thebusinessprofessor.com/judicial-branch-law/>

- **Discussion:** How many bills last year did Congress present to the President to sign into law? How many times did the President exercise his veto authority? Can you provide an example of a federal law that was overturned by the US Supreme Court? An executive action overturned by the US Supreme Court? Can you think of an example of a law that was narrowly or broadly interpreted to either limit or expand the breadth of the law?
- **Practice Question:** Congress passes a bill in the House and Senate and sends it to the office of the President for signature. What happens if the President does not want to sign the bill into law? By what method can the bill still

become law? What if the President signs the bill into law but refuses to enforce the law in accordance with its terms? Is there any method or remedy for challenging the President's failure to enforce the law in accordance with its provisions? What happens if the President signs the bill into law, but the law seems to burden or infringe upon the Constitutional rights of a group of US citizens? What methods and authority exist for challenging the validity of the law?

### 3. What is "Federalism"?

Federalism regards the separation between a central government and independent governmental sub-units. In the US system, federalism is the separation between the federal and state governments. The Constitution, under the 10<sup>th</sup> Amendment, specifically reserves power of self-governance to the states. This includes the authority to pass laws. For the Federal Government to pass a law, it must be based on a specific power or authority granted under the Constitution. States pass laws pursuant to their state constitutions and the "police power" inferred from the 10<sup>th</sup> Amendment. Police power is a state's authority to legislate for the public safety, health, general welfare, and morals of its citizens.

- **Discussion:** Can you identify any conduct that is almost entirely regulated under State law? Federal law?
- **Resource Video:** <http://thebusinessprofessor.com/federalism-us-system/>

### 4. What is the "Supremacy Clause" and "Preemption"?

Article VI, Section 2 of the US Constitution provides that the Constitution is supreme over all laws and that federal law is supreme over state law. Generally, the state and federal governments may regulate the same type of conduct. This is known as "concurrent power". However, any state law that prevents or interferes with the accomplishment and execution of the full purposes and objectives of Congress is invalid. Congress can expressly reserve an entire area of law for federal regulation. In such a case, the federal law "preempts" state law. If Congress does not expressly reserve the area of law for federal regulation, the state may also regulate it. State appellate courts or the US Supreme Court may review a state law and overturn it if it determines that the law conflicts with or violates a federal law.

- **Note:** Generally the state law can be more restrictive than the federal securities law.
- **Example:** The Federal Government regulates the immigration process. It expressly preempts states regulating this area of law. The Federal Government also regulates the purchase and sale of securities. States are not preempted from regulating the purchase or sale of securities, but a state law may not conflict with or prohibit the accomplishment of federal law.

- **Discussion:** Can you think of any recent state laws that were struck down because they conflicted with federal law? Can you think of any areas of law that are regulated by both state and federal law?
- **Practice Question:** The Federal Government passes a statute that regulates certain business practices. Specifically, it requires businesses to seek federal approval through a licensing process. The law does not include a provision that specifically prohibits states from also regulating this conduct. Arizona determines that it wants to regulate this same activity by states within its borders. So, it passes a state statute that requires businesses to also seek a state

license prior to undertaking the cover practice. Is this permissible? What if the state is far more stringent than the federal statute? Less stringent? Can the state require that a state license issue before a business may apply for a federal license?

- **Resource Video:** <http://thebusinessprofessor.com/supremacy-clause-us-constitution/>

## 5. What is the “Full Faith and Credit Clause”?

Article IV, Section 1 states, “Full faith and credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other state.”

- **Example:** State A issues a warrant for the arrest of Jane Smith. If the arrest warrant is transferred to State B for execution, State B may not intentionally fail to recognize the validity of the State A’s warrant.

Restated, Article IV requires that each state recognize the laws of every other state. The only exception to this rule concerns laws that violate the public policy of another state. In such case, a state may refuse to recognize the legality of the foreign law or legal agreement.

- **Example:** State A grants marriage licenses and performs marriages for same-sex couples. State B must recognize these marriages as valid. State B may attempt to argue that recognizing the marriages violates public policy. This argument, however, has generally been rejected by the US Supreme Court.

- **Discussion:** Can you think of laws recognized in one state but not another based on public policy? Currently, there is a debate across states regarding each state’s recognition of same-sex marriage. What are the implications of one state recognizing same-sex marriage and others not?

- **Practice Question:** John sues Donna in Maryland for losses suffered as a result of Donna’s fraudulent business practices. The court rules in favor of John and issues judgment against Donna for \$1 million. Instead of paying the judgment, Donna goes to California and resumes her business practices. If John attempts to collect the judgment against Donna, does California have any obligation regarding the recognition and enforcement of Maryland’s civil judgment?

- **Resource Video:** <http://thebusinessprofessor.com/full-faith-credit-clause/>

## 6. What is the “Privileges and Immunities Clause”?

Article IV, Section 2 states that, “Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” This clause seeks to avoid individuals gaining an advantage or being discriminated against by a state government simply because of the person’s state or residency. States may discriminate against members of other states in favor of its residents if there is a “substantial justification”. Substantial is a floating standard that may be subject to challenge by a court.

- **Note:** Try to think about the methods that a state could treat members of another state differently, such as through voting rights, ownership of property, taxation, etc.

- *Example:* State A cannot charge businesses organized in State B a higher rate of sales taxation on sales carried out in State A. This would be an unconstitutional privilege in favor of members of State A.

- **Discussion:** Can you think of a way in which a state has discriminated against citizens of another state that was held invalid by the court? What about a situation where one state discriminates against the citizens of another state and it is held to be valid? (Hint: If you are in a public university, think about your tuition payments.)
- **Practice Question:** Ellen and Gina are romantically involved and decide to marry in the state of Vermont. Soon after marrying, Ellen's employer transfers her to its office in Alabama. Alabama does not recognize same-sex marriage. Because of the transfer, Alabama state law does not recognize any of Gina's rights as Ellen's spouse. This becomes particularly important with regard to state insurance, real property, and inheritance law. Do you see any constitutional law issue?
- **Resource Videos:** <http://thebusinessprofessor.com/privileges-immunities-clause/>

## 7. What is the "Commerce Clause"?

Article I, Section 8, specifically grants to the Federal Government the right to "regulate commerce ... among the several states..."

The Commerce Clause allows the Federal Government to regulate any activity that affects "interstate commerce". It is the most commonly employed justification for the passage of federal laws affecting citizens and businesses within the US. In reality, almost any sort of business activity affects interstate commerce and thus falls under the regulatory authority of the Federal Government. The Federal Government does not, however, have the authority to regulate an activity that is carried out solely within a state's borders and has no discernible effect on interstate commerce.

- *Example:* The Federal Government may prohibit discrimination by hotels and theaters that serve individuals crossing state lines. It would not, however, be able to prohibit an individual from raising plants for personal consumption on private land, when the seeds for those plants do not originate outside of the state and the plants produced will never be sold commercially or transferred outside of the state.

Unless an area of law is expressly reserved for federal regulation, states have the authority to pass laws based upon their police power. The state law cannot "intend to regulate" or "substantially conflict with" interstate commerce. The substantially conflict with provision is known as the "Dormant Commerce Clause".

- **Discussion:** Can you think of any activities that are regulated under state law that would be outside of the regulatory authority of the Federal Government? Can you think of any historical cases where the Federal Government has passed a federal law that overturns state law? (Hint: Think about civil rights legislation and state laws discriminating against certain individuals.)
- **Practice Question:** Clarence owns land in Georgia. He plans on extracting a rare type of mineral from the land and selling it to baseball teams to rub on the baseball to reduce the bright glare of the ball when batting. The Federal Government passes a law that prohibits the sale of this type of product. Clarence is outraged that the

Federal Government will not allow him to collect and sell mud from his own land. Does the Federal Government have authority to prohibit Clarence's intended business? Explain.

- **Resource Video:** <http://thebusinessprofessor.com/commerce-clause/>

## 8. What is the "Taxing and Spending Power"?

Article 1, Section 8, expressly grants to the Federal Government the "Power to lay and collect Taxes, Duties, Imports, and Excises."

- **Resource Video:** <http://thebusinessprofessor.com/taxing-spending-power-us-constitution/>

The taxing and spending power allows for the funding of Federal Government operations. The ability to tax is limited by the requirement that all taxes be uniformly applicable to all individuals.

- **Discussion:** Can you think of a recent, landmark Supreme Court decision affecting health care that turned on the Taxing and Spending Power?

Article 1, Section 8 further allows the Federal Government to "Pay the debts and provide for the common Defense and general Welfare of the US."

This authority allows the Federal Government to incur and manage domestic and foreign debt. It also allows for the formation of the military and funding of the military defense budget.

- **Discussion:** Through what process does the United States incur foreign debt? What portion of the total revenue collected from taxes within the United States is allocated to defense spending? How does this compare to other countries in the world?
- **Practice Question:** The Federal Government seeks to determine automobile use parameters across the US. To begin the process, the Federal Government passes a law requiring individuals to register their vehicle as part of a national sales tax exemption program. Registering the vehicle will allow individuals to avoid a federal ad valorem tax on the value of the vehicle. Failure to register the vehicle will result in a 1% annual tax being assessed against the vehicle. The tax will be payable as part of the federal income tax return. Does the Federal Government have the authority to assess this tax penalty for failure to register a vehicle? Explain.

## 9. What is the "Contract Clause"?

Article I, Section 10 states that, "No state shall pass any Law impairing the obligation of contracts."

The Contract Clause prohibits state governments from specifically legislating to interfere with (or usurp) private contract

rights. It is, however, limited by the ability of state governments to legislate to interfere with those rights under their police power. The state may pass legislation impairing a contract if the law is passed to deal with a specific emergency situation. Further, a state government may generally legislate to regulate an industry or commercial activity. Such legislation may have the effect of interfering with existing contracts. Because the legislation is not directly targeted at interfering with an individual's (or business's) contract rights, it does not violate the Contracts Clause. The Contract Clause demonstrates the drafters' regard for the importance of individual contract rights.

- *Note:* The Contract Clause does not limit the power of the Federal Government to interfere with private contract.
- *Example:* John has a business in State A that conducts international trade. His largest trading contract is with ABC Company (a French Company). State A passes a law requiring that all trading with ABC Company can only be carried out by State A. This would be unconstitutional if State A is intentionally legislating to usurp John's contract rights. A general prohibition against all trade with ABC company, however, may be legal.

- **Discussion:** Historically, can you think of why the founders felt it necessary to include the Contract Clause into the Constitution?
- **Practice Question:** ABC Corporation in Boston has an ample tea trade with England. ABC brings in nearly \$500 million annually. The fears that ABC Corp is creating a sort of monopoly and passes a law that no single corporation can gross more than \$100 million in annual sales from a single commodity. Is this type of statute constitutional?
- **Resource Video:** <http://thebusinessprofessor.com/contract-clause-us-constitution/>

### 10. What is the “1<sup>st</sup> Amendment”?

The 1<sup>st</sup> Amendment to the Constitution states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

This amendment provides for the following fundamental freedoms:

- Freedom of Religion
  - Freedom of Speech
  - Freedom of Press
  - Freedom of Assembly
- **Discussion:** Why do you believe the Framers decided to group these rights together? What political significance did the Framers hope to achieve through the 1<sup>st</sup> Amendment?
  - **Resource Video:** <http://thebusinessprofessor.com/1st-amendment-us-constitution/>

### 11. What are the “Establishment Clause” and “Free Exercise Clauses”?

The freedom of religion portion of the 1<sup>st</sup> Amendment is made up of the Establishment Clause and the Free Exercise Clause.

- **Resource Video:** <http://thebusinessprofessor.com/freedom-religion/>

### *Establishment Clause*

The 1<sup>st</sup> Amendment states that, “Congress shall make no law respecting an establishment of religion” or “prohibiting the free exercise thereof.” The first provision of this clause is known as the “Establishment Clause”. It stands for the principle that the government should not force any particular religion(s) onto its citizens.

- **Discussion:** Historically, why did the Framers seek to prohibit the Government from establishing a state religion? How has this clause been interpreted with regard to government actions and religious activity?

### *Free Exercise Clause*

The second provision of the 1<sup>st</sup> Amendment addressing religion is known as the “Free Exercise Clause”. It provides that the government cannot prohibit individuals from practicing any religion. The Free Exercise Clause has been the subject of significant litigation charging the government with discriminating against individuals’ religious practices. The common law test for determining whether a government statute runs afoul of the Free Exercise Clause by unduly restricting the free exercise of religion is as follows:

- **Secular Purpose:** Does the statute or government action affecting religion have a secular (non-religious) purpose? If the purpose of the statute or government action is to somehow promote any single or particular group of religions, the statute is unconstitutional. If the purpose of the statute or government action is not to promote religion, then move onto the next step.
  - **Example:** If a government allows a manger scene on government property during Christmas and denies citizens the right to put a menorah or minaret, this action would not have a secular purpose.

- **Discussion:** Can you think of any examples of government action that have been challenged as effectively promoting a particular religious practice?

- **Primary Effect:** Is the primary effect of the statute or government action to advance or inhibit religion? Even if the purpose of the statute or action is secular, it may violate the Establishment Clause if the primary effect is to somehow advance or inhibit a religion among the citizens. The word “primary” is of particular importance. It leaves room for statutes or actions that only incidentally promote a particular religion. If the primary effect is something other than advancing or inhibiting religion, move on to the next step.

- **Discussion:** Can you think of any examples of laws or government actions that have a purpose other than promoting a religion, but do have an incidental effect of promoting a religious practice?
- **Excessive Entanglement:** Does the statute cause excessive government entanglement with religion? Even if the statute only has a secondary effect upon religion, it may still result in too much government involvement with religious practice to comply with the Establishment Clause. This is a floating standard that greatly depends on the specific law and how it affects religious practice.
- **Discussion:** How do you feel about allowing a court this level of autonomy for determining when a statute or government action is simply too closely related to religious activity?

If a law or government action violates any one of the above elements, it is an unconstitutional infringement of the 1<sup>st</sup> Amendment's religious protections.

- **Discussion:** Do you think that the government should pass laws that have an effect on any single religion? Can you think of any examples of a law that has a secular purpose but has an effect of promoting a religion? How would you measure whether an effect on promoting religion is strong enough to be considered a primary effect? At what point do you think government influence on religious practice becomes excessive entanglement?
- **Practice Question:** Mary is the mayor of Small Town, Texas. She is a Christian and believes that everyone else in the world should be as well. She proposes a resolution to the city council to make Christianity the official religion of Small Town. As part of her proposal, she lays out a plan to convert part of the city hall into a sanctuary to hold Christian services on Sunday. What are the Constitutional issues implicated by these proposals?
- **Resource Video:**

## 12. How does freedom of religion affect business practice?

Generally, for-profit businesses covered by Title VII of the Civil Rights Act of 1964 may not discriminate against employees on the basis of religion. There is an exception for religious organizations whose primary purpose necessitates religious practice or affiliation among its employees. Aside from the prohibitions on employment practices, common law holds that closely-held corporations may have religious protections similar to those of citizens.

- **Note:** This issue came to the forefront of consideration in the case, *Burwell v. Hobby Lobby Stores, Inc.*, The Court found that the religious beliefs of owners of the closely-held entity were sufficiently tied to the religious beliefs of the owners to be susceptible to protection under the 1<sup>st</sup> Amendment. The court's holding exempts closely-held businesses from laws that mandate or prohibit certain conduct conflicting with that belief.
- **Example:** ABC, LLC is a small restaurant with 25 employees. ABC is solely owned by a family of devout Christians. ABC refuses to hire any employees who are not Christian. Further, ABC refuses to offer a health insurance plan than covers subscriptions for birth control. ABC's failure to hire non-Christians may constitute illegal discrimination. The common law, however, allows a closely-held business entity to adopt the religious

beliefs of its owners. As such, refusing to sponsor a health insurance plan that contains provisions conflicting with the owner's religious beliefs is likely legal. This example demonstrates the fine line between business practices that discriminate against others based upon religious belief with practices that cause a business to violate its own beliefs.

- **Discussion:** Why do you think the government makes an exception to the employment discrimination laws allowing religious organizations to discriminate? What is your view of the holding in the Hobby Lobby case that a business entity can adopt (and enforce) the religious rights of its owners?
- **Practice Question:** John is the sole owner of Outdoor, LLC, a hunting and fishing store. Outdoor is located in a town that has an ordinance requiring all downtown shops to be open on weekends for customer shopping. The ordinance is part of an economic revitalization effort in the town. John has 15 employees in his shop. He observes fundamental Christian beliefs. He refuses to open his shop on Sundays in observance of his beliefs. He also refuses to hire any women employees because he believes that women should not work and should be subservient and remain in the homes of their fathers or husbands. Are there any legal issues with John refusing to open on Sundays or refusing to hire women?
- **Resource Video:** <http://thebusinessprofessor.com/businesses-and-religious-freedom/>

### 13. What conduct is protected pursuant to the 1<sup>st</sup> Amendment's assurance of "freedom of speech"?

The 1<sup>st</sup> Amendment provides for the freedom to speak and express oneself. The freedom of speech is far broader in its protections than simply protecting the spoken word. It protects individual rights with regard to any form of expression. Forms of expression may include speech, writings, physical expressions, symbols or symbolic activity, etc. The freedom of speech may still face certain limitations by the government. Certain types of speech are not protected. Further, the government may place certain limitations on the location and timing of speech that takes place on government property or somehow affects the rights of others.

- **Note:** Remember, the Constitution protects an individual's rights against infringement or repression by the government. Individuals or businesses cannot infringe upon an individual's freedom of speech.
- **Example:** ABC is a small town. A local ordinance limits the ability of citizens to give speeches or carry out other forms of expression on municipal property without first obtaining a permit. The permit procedure requires that any form of public expression be conducted within certain hours and not exceed a certain noise level. These are examples of government interference with free speech. This may, however, be legal as a limited restriction on speech. The standards applied by courts when a law infringes upon a fundamental right are discussed at the end of this chapter.

- **Discussion:** Why do you think the freedom of speech is interpreted broadly to include all forms of expression? What type of events have you witnessed that are protected under the 1<sup>st</sup> Amendment's freedom of speech? Does the breadth in types of conduct to which the freedom of speech applies surprise you?
- **Practice Question:** Small Town is a small city located in Mississippi. Small Town has a local ordinance that prohibits publicly criticizing state officials who visit the town as part of their official duties. This includes writing

derogatory articles in the newspaper or speaking ill of these individuals in public. The objective of the ordinance is to prevent citizens of the town from alienating state officials who may be linked to state funding or other resources that the town needs. Can you see any Constitutional issues with this ordinance?

- **Resource Video:** <http://thebusinessprofessor.com/freedom-speech/>

#### 14. What type of speech is either not protected or receives limited protection?

The Supreme Court has interpreted the 1<sup>st</sup> Amendment to not protect all forms of speech. That is, some forms of speech or expression may be limited or fully prohibited by the Government. In determining whether a type of speech or expression is protected, the court will balance the rights of the individual against the potential harm to or effect upon the rights of others. Because the freedom of speech is a fundamental right, the Government cannot limit speech without a compelling government interest justifying the restriction. Pursuant to this understanding, statutory and common law often prohibit or limit the protections offered to: Obscene Speech, Fighting Words, Commercial Speech, Defamation, and Political Speech.

- **Discussion:** Do you think it is important that the Supreme Court has recognized exceptions to the blanket protection of an individual's freedom of speech?
- **Practice Question:** ABC township passes an ordinance that prohibits any form of speech that in the town center that causes a disruption to the local businesses surrounding the square. This ordinance obviously limits the rights of individuals to express themselves in the public square. If this ordinance is challenged in court on constitutional grounds, what type of analysis will the government undertake to determine whether it violates the Constitution?

Each type of non-protected or partially-protected speech is:

- **Obscenity** - Obscene expressions are those that appeal to the "prurient interest". Such expressions are deemed harmful to the community. There is no standard definition of obscenity; rather, courts determine whether an expression is obscene based upon the beliefs, perceptions, or standards of the local population. While there is no common definition of obscenity, a state or local law that is too restrictive or broad in its provisions limiting expression is subject to be overturned by the judiciary as an undue restriction on the freedom of speech.
  - **Example:** One community may feel that allowing fully nude dancing in night clubs is obscene; while other communities may not believe it to be obscene.

- **Discussion:** How do you feel about using a floating standard for determining what is obscene? Can a law, therefore, begin to violate 1<sup>st</sup> Amendment protections if the beliefs and understandings of the local population change or evolve?
- **Practice Question:** ABC Town has a local ordinance that prohibits any form of nude dancing. XYZ Town is located just north of ABC. XYZ does not restrict any form of public nudity. If a citizen of ABC Town challenges the local ordinance, what standard will the court apply in determining whether the ordinance violates the citizen's 1<sup>st</sup> Amendment freedom of speech? (Hint: Ignore any argument that such a statute is

overbroad.)

- **Resource Video:** <http://thebusinessprofessor.com/obscene-speech-and-the-1st-amendment/>

- **Fighting Words** - Fighting words are those deemed likely to immediately incite violence by listeners. An important requirement for an expression to constitute fighting words is that the threat of violence be immediate. This means that the subject-matter exception is determined by the physical presence and likely reaction of third parties.

- **Example:** Many public presentations openly calling for violent activity by the crowd are limited or regulated; however, the same form of expression recorded and later distributed to listeners may not constitute fighting words. The difference is the immediacy of the threat of violence created by the presence of a crowd.

- **Discussion:** Can you think of any activities in history that have been censored under the grounds that it is inciting immediate violence? Can you think of any examples of speech that have incited violence, but have been protected because the incitement was not immediate in the location of the speech?

- **Practice Question:** Eric is a separatist and anti-government activist. He routinely calls for the succession of State B from the United States. He holds a rally in State B, during which he plans to deride the minority population in the state. Local authorities are worried about the rally resulting in violence. If the permit for the rally is denied because of these concerns and Eric challenges the denial in court, what facts will the court review in determining whether the denial is Constitutional? Would it matter if Eric plans to hold the rally in a small private venue, but the speech will be broadcast *via* a number of media sources?

- **Resource Video:** <http://thebusinessprofessor.com/fighting-words-and-the-1st-amendment/>

- **Commercial Speech** - There is only a limited right to undertake commercial speech. Such expressions necessarily involve third parties who take actions based upon that speech. The government's regulation of commercial speech is based upon the potentially negative effect on the general welfare of society. The limitation upon the regulation of commercial speech is that the government must have a compelling state interest to justify the restriction.

- **Note:** Common law holds that corporations have limited rights to free speech that are very similar to those of individuals. The Constitutional standards applied by a court when determining the validity of government laws or actions limiting an individual's rights are discussed in a separate section.

- **Example:** Business practices that knowingly deceive individuals may constitute fraud. Many deceptive advertising practices violate consumer protection laws. The federal and state governments require disclosure of material information about publicly-held companies. All of these examples demonstrate a balance between protecting the public and protecting the freedom of speech afforded individuals.

- **Discussion:** Can you think of any type of commercial speech that is prohibited by federal, state, and local

laws? What is the risk to the public of allowing this type of unregulated speech?

- **Practice Question:** Hickory, NC is famous for its production of fine, wood furniture. Every year, thousands of people and stores come to Hickory to purchase furniture. Numerous companies that produce their furniture in other places have opened shops in Hickory to sell to customers. These companies routinely assemble the pieces of furniture in Hickory and advertise the furniture as “Made in Hickory”. The town passes an ordinance prohibiting this practice. If a merchant challenges the ordinance, what will the court examine in determining whether the ordinance is constitutionally valid.

- **Resource Video:** <http://thebusinessprofessor.com/commercial-speech-and-the-1st-amendment/>

- **Defamation** - Defamation is the publication (open communication) of false statements about others that will knowingly subject that person’s character to ridicule or disrepute. “Slander” is verbally defaming someone. “Libel” is defaming someone through a writing. “Disparagement” is defaming someone’s business prowess or practice. Defamation statutes do not prohibit this type of speech (a prior restraint of the speech); rather, they allow an individual harmed by the speech to recover damages for harm suffered as a result of the speech. Potential liability for defamation, however, can have the effect of dissuading free speech. This fact must be balanced against the protections afforded the individual who is the subject of the defamatory expression. In any case, the defamed individual must demonstrate an actual harm suffered as result of the defamation.

- **Example:** A state passes a law that allows for a civil cause of action (and damages) against an individual who makes a false statement about another person that results in harm to that person’s reputation. While an individual has a 1<sup>st</sup> Amendment right to make any form of speech or expression, this right must be balanced against the rights of those who may be harmed by such speech or expression. In this case, promoting the well-being of citizens is a compelling interest of the state. Allowing a cause of action for this sort of defamation is likely constitutional.

- **Note:** To lessen the potential for the suppression of the free and open press, a plaintiff must show intentional defamation or “malice” by the publisher toward the defamed person. Likewise, a public figure or celebrity must demonstrate this higher standard of intent to hold someone liable for defamatory statements. Disparagement represents the societal interest of allowing individuals to undertake commercial activity free of the damaging effects of defamatory attacks.

- **Discussion:** How do you feel about the balancing of an individual’s freedom of speech rights against the rights of individuals to not be harmed by false speech? Remember, the freedom of speech is expressly stated in the Constitution, while an individual’s protection against harm from false statements is not.

- **Practice Question:** Martin is under investigation from acts of terrorism. When the news media learns of this, they report on national television that Martin is a suspect. This leads to all sorts of hate mail and threats against Martin. Martin is ultimately ruled out as a suspect for the terrorist activity. Nonetheless, the investigation and television coverage has caused serious harm to Martin’s career and lifestyle. What would Martin have to show to hold the new media liable for its reporting?

- **Resource Video:** <http://thebusinessprofessor.com/defamation-and-the-1st-amendment/>

- *Political Speech* - Individuals and corporations are entitled to only limited protection of political speech. Political speech includes the spending or donation of money to political campaigns or undertaking political activism. As such, political contributions by individuals or entities may be subject to regulation. Individuals and businesses are limited in the amount of funds that they can contribute to political candidates for federal office and certain groups that donate to political candidates. Historically, corporations were also limited in their ability to directly fund or undertake political activism. The issue of direct spending in elections came to the forefront in the case, *Citizens United v. Federal Election Commission*. In this case, the court held that corporations hold rights similar to those of individuals with regard to political speech. As such, many of the existing regulations of the amount of funds or activity that a corporation may spend or undertake with regard to political campaigns were held invalid. This case did not, however, affect the legal limits on individuals and organization to make contributions directly to candidates and groups dedicated to making contributions to candidates.
    - *Note:* These provisions apply to federal elections and not state elections. Also, there is currently no limit on the amount of money that an individual or corporation can make to independent-expenditure-only committees, also known as “Super-Pacs”. These groups spend directly on political activity in support of particular candidates.
    - *Example:* A state passes a law that limits the amount of money that citizens and corporations can give directly to state politicians running for office. While giving money is a type of expression that is protected under the 1<sup>st</sup> Amendment, this restriction upon individual rights aimed at preserving the integrity of the election system may be constitutional.
- ***Discussion:*** How do you feel about a corporation being deemed to have the same freedom of speech protections as individuals? Should the rights of freedom of speech be weighed against the impact of allowing corporations to impact the outcome of political elections?
  - ***Practice Question:*** Dorothy is very dedicated to supporting her preferred political party and its candidates. She routinely makes donations to candidates and to political groups. She inherits a large sum of money from her grandmother and is considering donating all of the money directly to a candidate that she supports for federal office. Can this result in any legal issues? What are some other options or methods of donating the money in support of the political candidate?
  - ***Resource Video:*** <http://thebusinessprofessor.com/political-speech-and-the-1st-amendment/>

### 15. What is “overbreadth” or an “overbroad” law affecting freedom of speech?

To pass constitutional muster, the government must have a compelling interest in passing a law regulating free speech. The law is deemed overly broad if, in the process of regulating unprotected speech, it negatively impacts protected speech that was not intended. In this way, it affects more speech than is necessary to achieve the government’s compelling interest. While the law may be constitutional in some applications, the possibility that it could negatively affect the protected free speech means that it is unconstitutional.

- *Example:* A state passes a law that restricts individuals from urging support for a political candidate at a polling location. The purpose of the statute is to prevent undue pressure of individuals in exercising their right to vote. The statute, however, is likely too broad in that it could prohibit individuals from having casual conversations about their voting activity. As such, the law would have to be more “narrowly tailored” for it not to violate 1<sup>st</sup> Amendment protections.

- **Discussion:** Do you believe that overly broad statutes could have the effect of causing individuals refrain from speech or expression that would otherwise be constitutionally protected?
- **Practice Question:** ABC Town passes an ordinance that prohibits any form of nudity in public. The local theater wants to put on a production of a famous ballet that requires the lead ballerina to temporarily expose her breasts during the performance. If the theater brings a court action challenging the ordinance, what will the court consider in determining whether the ordinance is constitutional?
- **Resource Video:** <http://thebusinessprofessor.com/overbreadth-and-overly-broad-laws/>

## 16. What is the “Freedom of Press” granted under the 1<sup>st</sup> Amendment?

The 1<sup>st</sup> Amendment states that, “Congress shall make no law ... abridging the freedom of ... the press.” Generally, it prohibits attempts by the government to curtail the freedom of expression through the public dissemination of information. More specifically, it prohibits any restraint prior to the publication of information, or “prior restraints”. Rather, protections of free press are commonly reduced after the publication of the information. That is, an individual or organization may be held liable subsequent to the publication of information, as the publication may run afoul of laws protecting the public (e.g., defamation).

- *Example:* The local news channel may report on any matters of public interest pursuant to the freedom of the press. Limiting the content that the media may cover is a prior restraint and would abridge this freedom. Holding the new channel liable for intentionally defaming a person is a limitation on freedom of press that is generally constitutional.

- **Discussion:** How do you feel about the freedom of press? Should it be broader or more limited? Why? Why do you think the law distinguishes between prior restraints and restraints after the fact?
- **Practice Question:** Ernie has an Internet blog covering political issues that is becoming increasingly popular. Ernie’s state legislature passes a law that limits the ability to cover special interest group spending on lobbying activity. If Ernie challenges the law in court, what do you think will be the outcome?
- **Resource Video:** <http://thebusinessprofessor.com/freedom-press/>

## 17. What is the “Freedom of Assembly”?

The freedom of assembly, commonly known as the “freedom of association”, protects individuals’ rights to assemble in groups for the purpose of expressing common beliefs or pursuing common interests. The right of assembly includes the

right to physically assemble and the right to be a member of an organization. The right of physical assembly is commonly restricted by “time, place, and manner” restrictions. These restrictions must meet the highest level of scrutiny when determining whether such restrictions are constitutional.

- *Example:* The government commonly requires permits or licensing for assembly. This is a limited regulation of the time, place, and manner of assembly. The application process cannot totally close off the assembly. But, it may require that the participants adhere to limited restrictions.
- **Discussion:** Do you feel that common time, place, and manner restrictions on the freedom of assembly are overly burdensome? Or do you feel that this government authority is sufficiently extensive? Can you think of historical acts of assembly that were challenged based upon time, place, and manner or permit restrictions?
- **Practice Question:** Beverly is interested in having a public rally protesting police brutality in the city. Public gatherings are generally limited to Monday through Saturday, but Beverly wants to hold the rally on Sunday. The city manager that approves requests for permits is adamantly against Beverly’s cause. He refuses Beverly a permit based upon the request for a Sunday date. Is there any issue with this situation?
- **Resource Video:** <http://thebusinessprofessor.com/freedom-of-assembly-or-association/>

### 18. What is the 5<sup>th</sup> Amendment to the Constitution?

The 5<sup>th</sup> Amendment contains a number of protections for US Citizens. Specifically it protects against self-incrimination by individuals (not corporations). That is, an individual cannot be compelled to testify against herself. It prohibits subjecting an individual to double jeopardy for alleged criminal conduct. This means that the government cannot subject an individual to multiple prosecutions for the same activity. The 5<sup>th</sup> Amendment also requires the government to pay just compensation to individuals for property taken or appropriated for public use. This concept most frequently arises in cases of “eminent domain” (discussed in a subsequent chapter). Arguably, the most important protection, however, is the protection of an individual’s right against deprivation of “life, liberty, and property without due process of law.” This protection is known as the “Federal Due Process Clause”. It assures the protection of citizen’s substantive and procedural rights in the passage and execution of laws by the Federal Government.

- *Example:* I receive a subpoena to testify in a criminal trial. While on the stand, I am asked questions that may incriminate me if I answer truthfully. I request not to answer the question based upon the observance of my 5<sup>th</sup> Amendment right against self incrimination.
- *Note:* The 5<sup>th</sup> Amendment does not prevent the federal and state governments from bringing charges against an individual for the same conduct. The Supreme Court also recognizes a fundamental right to privacy implied in the 5<sup>th</sup> Amendment protections.
- **Discussion:** Many people are familiar with the 5<sup>th</sup> Amendment in criminal law cases because of popular comedy skits (see The Dave Chapelle Show) or through popular movies (see Double Jeopardy). In what contexts are you familiar with the use of Amendment?
- **Practice Question:** Meredith is confused about what protections exist under the 5<sup>th</sup> Amendment of the

Constitution. She knows that there are criminal law protections and procedural protections. Can you briefly explain the various protections of the 5<sup>th</sup> Amendment to her?

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-5th-amendment/>

## 19. What is “Due Process” of Law?

Due Process rights assure “fundamental fairness and decency” in any governmental act or process that may affect the “life, liberty, property or other constitutional rights” of its citizens. The concept of due process is broken down into “substantive due process” and “procedural due process”. Substantive due process allows the court to safeguard the rights of individuals against infringement by the government. More specifically, it introduces a standard that laws that touch upon the fundamental rights of individuals may be outside of the authority of the government to regulate. This tends to protect a minority population from the unfair consequences of laws passed by the majority. Procedural due process stands for the principle that the government may not act in a manner that is “arbitrary, capricious, or unreasonable” when subjecting an individual to the laws of the state. Procedural due process further entails the observance of individual rights in the passage of laws and regulations. The government establishes certain standards for determining when a law may justifiably infringe upon an individual’s constitutional rights. That is, a law that infringes on a fundamental right must meet a certain standard (discussed further below) to be constitutional.

- *Note:* The due process clause applies to both individuals and corporations.
- *Example:* Procedural due process requires fair procedures in the carrying out of a criminal trial, such as the right to notice and the ability to respond to an accuser. It may also include the right to public vote or comment on a proposed law or regulation.

- **Discussion:** Are you familiar with *Miranda* rights? How does the *Miranda* rights doctrine demonstrate principles of due process of law?
- **Practice Question:** Jake wants to open a restaurant in his town. He purchases some land and begins the process of getting the necessary licenses and permits. There is a local board charged with determining whether to grant licenses for in-town businesses. The board does not believe the town needs another restaurant and denies Jake a license. Jake inquires about a process for appealing the board’s decision, but the code of ordinances does not allow for appeal from board decisions. If Jake files a lawsuit challenging the ordinance and the board’s process, what arguments might he raise against the board procedure?
- **Resource Video:** <http://thebusinessprofessor.com/5th-amendment-federal-due-process-clause/>

## 20. What is the 14<sup>th</sup> Amendment’s Due Process Clause - “Incorporation Doctrine” and “Equal Protection Clauses”?

The 14<sup>th</sup> Amendment to the Constitution states that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” These provisions are known as the Due Process Clause and the Equal Protection Clause. Each of which are discussed below.

- **Resource Video:** <http://thebusinessprofessor.com/14th-amendment-us-constitution/>

### *Due Process Clause - Incorporation Doctrine*

- The 14<sup>th</sup> Amendment's Due Process clause is an incorporation doctrine. In addition to requiring that states observe principles of due process in the execution of laws, it makes all of the provisions of the Bill of Rights applicable to state governments. That is, state governments cannot act to infringe upon the constitutionally protected rights of its citizens. As previously stated, the 5<sup>th</sup> Amendment's Due Process Clause applies strictly to the Federal Government.
  - *Example:* If a state arrests an individual, it must follow procedures that protect her constitutionally-granted rights. This may include providing the individual with an attorney, notification of the charges against her, a speedy trial (if requested), a jury trial, etc. Further, if an individual is subject to administrative action by the government, the administrative process must not infringe upon her constitutionally-granted rights. This may include a notice of administrative action, the opportunity to be heard, and the ability to seek review of an agency's decision in a court of law.

- **Discussion:** What would be the effect if the Bill of Rights did not apply to state government?
- **Practice Question:** State A passes a law that states that all forms of public speech involving political matters is prohibited. If the Constitutionality of the law is challenged, what Constitutional provisions are implicated?
- **Resource Video:** <http://thebusinessprofessor.com/incorporation-doctrine/>

### *Equal Protection Clause*

- The Equal Protection Clause of the 14<sup>th</sup> Amendment embodies the ethical idea that law should not treat people differently without a satisfactory reason. This generally protects citizens from discrimination under the law or through government action based upon their exercise of a fundamental right or based upon race, gender, and ethnicity. This clause focused on the historical discrimination present from the days of involuntary servitude. It forced upon state governments the Civil Rights Act of 1866.
  - *Example:* The Equal Protection Clause prohibits a state from penalizing criminal conduct of a particular race more severely than the same conduct by another race.

- **Discussion:** Can you think of historical incidences where state laws have been held unconstitutional per the Equal Protection Clause? Hint: Think of voting and education rights.
- **Practice Question:** State A passes a law that all Hispanics in the state must provide proof of citizenship and residence prior to registering children for public school. Does this provision violate any

Constitutional protections?

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-equal-protection-clause-of-the-14th-amendment/>

## 21. What are the standards by which the government (through laws or actions) may infringe on individual rights?

The above discussions should demonstrate that many laws, to some extent, infringe upon the rights of citizens. Individuals often challenge the constitutionality of these laws in court. As previously stated, one role of the judiciary is to determine the constitutionality of laws and the execution of those laws. For a law to pass constitutional muster, it must meet a certain standard justifying its existence. The standard that the court applies depends upon the rights infringed upon. Below are explanations of the applicable standards.

- **Resource Video:** <http://thebusinessprofessor.com/standards-constitutionality/>
- **Minimum Rationality** - This standard, also known as the “Rational Basis Standard of Review”, requires that a law have a rational connection to a permissible state end (a legitimate goal of the government). The classification must have a reasonable basis (not wholly arbitrary), and the courts will assume any statement of facts that can be used to justify the classification. This standard applies to laws that affect a non-fundamental right or one that is not expressly protected under the Constitution, such as social welfare and economic matters. As such, it is the default standard by which the court reviews a law to determine constitutionality. The standard is higher if the law affects a fundamental right, such as due process or equal protection rights.
  - **Example:** The state passes a law concerning the speed limit on state highways. This law is not related to a fundamental right; rather, it is related to the privilege of driving. As such, this law would need to have a rational connection to a legitimate state goal. The goal of reducing traffic accidents or promoting motorist safety is sufficient to find the statute constitutional.
  - **Discussion:** The court is left to interpret what constitutes a legitimate government interest. There is no formal test established for this purpose. How do you feel about the level of autonomy left to the court in making this decision? (Note: When the government fails to provide a legitimate interest promoted by its law or action, the duty of the court is to “seek out other conceivable reasons for validating” the law or action.)
  - **Practice Question:** The state government passes a law stating that individuals cannot watch any sort of screen or video projector while driving in a car. If a group of drivers and makers of car video players challenges the constitutionality of the law, what standard would a court apply in determining constitutionality?
  - **Resource Video:** <http://thebusinessprofessor.com/minimum-rationality-rational-basis-review-for-constitutionality/>

- *Strict Scrutiny* - This standard requires that a law have a compelling state purpose to be constitutional. Further, the law in question must be “narrowly tailored” to achieve that purpose and must be the “least restrictive means” of achieving that purpose. This means that the government must make certain that the law is not overly broad in the type of conduct that it affects. Further, there must not be another method of achieving this purpose without infringing upon the affected individual’s rights. Strict scrutiny is used if the classification involves a fundamental right under the Bill of Rights or under the Due Process Clause. It is also applied when a law or government action specifically affects a suspect class. That is, the law or action has a discriminatory effect based upon race, gender, religion, and national origin.
  - *Example:* The state passes a law prohibiting individuals from burning the state flag. Burning a flag is a form of expression that is protected by the 1<sup>st</sup> Amendment. For this statute to be constitutional, it must achieve a compelling governmental purpose (within the state’s police power), be narrowly tailored to achieve that purpose, and be the least restrictive means of achieving that purpose. In this situation, there is likely no compelling purpose related to the state’s police power that justifies limiting an individual’s 1<sup>st</sup> Amendment rights. As such, the state statute would likely be held unconstitutional.
  - *Discussion:* There is no single standard for determining what is a compelling state purpose. The court must determine whether the law’s purpose is a compelling interest. How do you feel about the court’s autonomy in making this determination? Do you believe that the requirement that the law be narrowly tailored and the least restrictive means of achieving the purpose adequately protect an individual’s fundamental or constitutionally protected rights?
  - *Practice Question:* The state passes a law stating the news media must receive approval from state authorities before reporting on any criminal investigations. The purpose of the law is to make certain that the new reporting does not detriment an investigation in process. A media group challenges the law in court, alleging that the law is a violation of the 1<sup>st</sup> Amendment. What analysis will the court apply in determining whether the law is Constitutional?
  - *Resource Video:* <http://thebusinessprofessor.com/strict-scrutiny-standard-of-constitutional-review/>
- *Intermediate Scrutiny* - This standard requires that the law further an “important government interest”. It must do so in a manner that is “substantially related” to the objective. When laws only partially affect a suspect class or the rights involved border upon fundamental rights, this intermediate level of scrutiny applies. This standard has been applied in determining the constitutionality of laws or government action based upon sex; laws affecting the status of undocumented or illegal immigrants; restrictions on rights to own firearms; and content-neutral restrictions on free speech.
  - *Example:* The city of Atlantis passes an ordinance limiting the ability of individuals to own a firearm without first undertaking a gun safety course, passing a background check, and filing for a permit from the locality. This statute affects an individual’s 2<sup>nd</sup> Amendment rights to own a firearm, but it does not prohibit it. As such, this scenario would likely be evaluated under intermediate scrutiny. Atlantis must demonstrate an important government interest, such as the reduction of a high level of gun violence in the jurisdiction. The statute must be substantially related to achieving that objective. The constitutionality of

the statute would turn on the interest of the state versus the burden that it places on an individual's constitutionally protected right.

- **Discussion:** Can you think of any recent cases applying intermediate scrutiny to overturn a government law affecting a suspect class or individual rights?
- **Practice Question:** Town A passes a law stating that no individual may transport a loaded weapon on public property without a license. A gun rights group challenges this law in court as restricting the 2<sup>nd</sup> Amendment's right to bear arms. What standard will the court likely apply in determining the Constitutionality of this law?
- **Resource Video:** <http://thebusinessprofessor.com/intermediate-scrutiny-or-quasi-strict-scrutiny/>